

Exhibit 43

CONFIDENTIAL - L. Rabinowitz

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

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In Re: Chapter 11 Case No.
08-13555 (JMP)

LEHMAN BROTHERS HOLDINGS INC., (Jointly Administered)
et al.,

Debtors.

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* * * CONFIDENTIAL * * *

VIDEOTAPED DEPOSITION OF LAURENCE RABINOWITZ

New York, New York

September 4, 2013

Reported by:

KATHY S. KLEPFER, RMR, RPR, CRR, CLR

JOB NO. 65270

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2 cases are. They are standard textbooks in
3 England dealing with the law of guarantees,
4 including the law of indemnity, and I went to
5 those basic textbooks and I looked at them.

6 Q. Is that where you found the cases that
7 you considered to be the key cases?

8 A. That would be sometimes where I found
9 the cases, and obviously when you look at a
10 case, that may take you to another case; so both
11 of those approaches were taken.

12 Q. How did you find the Rainey case?

13 A. The Rainey case Mr. Patton discovered.

14 Q. How did he discover it?

15 A. I think he was doing a search, having
16 identified one particular case in order to
17 ascertain that there was -- that he was aware of
18 all cases which touched on the subject that was,
19 in effect, a West Law type search or a Lexis
20 search, I'm not sure how you would refer to it
21 here, I looked Rainey.

22 Q. Did you find the Rainey case in any of
23 the key textbooks that you looked at?

24 A. I don't think we did, no.

25 Q. Did you conduct any interviews?

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2 University of South Africa. In effect, what
3 they have at the university, University of
4 Witwatersrand, is a prize for the top graduating
5 student and the top non-graduating student.
6 Juta was a famous, I think, judge in South
7 African history and he gave his name to this
8 prize.

9 Q. And you won both of them?

10 A. I won it in both years.

11 Q. You say that you're the current editor
12 of Weinberg & Blank on takeovers and mergers,
13 and it's the leading text on that subject.

14 Have you done any writing in the field
15 of landlord and tenant law?

16 A. No, I haven't.

17 Q. And have you done any writing in the
18 field of the law of guarantees?

19 A. No, I haven't.

20 Q. What do you think makes you an expert
21 on the subject matter of this case?

22 A. I have many years' experience
23 practicing in commercial law. Law of guarantees
24 is a subset of the law of contract, which is my
25 specialist area, if you like, it's what I do.

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2 Commercial law is contract, and contract
3 includes guarantees.

4 I have over the years advised on a
5 number of occasions in relation to guarantees
6 and indemnities, and I guess, more than that,
7 the way in which English law works, I suspect
8 the way in which American, US law works, is that
9 the law is to be gleaned from decided cases.

10 I have an expertise in understanding
11 and interpreting English law cases and, in
12 particular, English law cases in the commercial
13 law field.

14 Q. Isn't that what all lawyers do?

15 A. Well, maybe some lawyers do it better
16 than others, but I guess that is what all
17 lawyers do. Indeed, I suspect in England a lot
18 of lawyers don't practice in commercial law. In
19 England, there are subdivisions between
20 commercial law, I guess people do administrative
21 law, they do criminal law, matrimonial law.

22 Q. Right. Is there anything that makes
23 you more of an expert in the subject matter of
24 this case than other lawyers practicing
25 commercial law in England?

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2 A. I suppose that there will be lawyers
3 in England who have an equal expertise to me,
4 but there will be some who don't have either my
5 experience or, indeed, I guess my abilities,
6 without trying to be funny about it, in terms of
7 analyzing and understanding commercial law
8 cases.

9 Q. So what makes you an expert in this
10 field as compared to other commercial lawyers is
11 that you are better at it than they are?

12 A. I have a great deal of experience in
13 the area and I understand the way English law
14 works.

15 Q. Do you believe you have more or less
16 experience than Richard Millett in the areas
17 that are the subject matter of this case?

18 A. Mr. Millett, because he's been
19 involved in a textbook, would certainly have a
20 more general familiarity with the Law of
21 Guarantees, as he calls his book, than I would.
22 However, in relation to the issues that arise in
23 this dispute, I would suggest that I have as
24 much expertise as he does because there is no
25 real dispute between us as to what the law of

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2 guarantees and indemnities is. It's all about
3 the interpretation of that law to the facts of
4 this case.

5 In terms of that, that is to say the
6 interpretation of the law to the facts of this
7 case, that primarily turns on issues of
8 contractual interpretation. In that particular
9 area, I would suggest I have at least as much
10 expertise, if not more, than Mr. Millett.

11 Q. Paragraph 14 on page 4 says, "I have
12 not testified as an expert at trial or by
13 deposition in the last four years," and just to
14 confirm, you have never testified as an expert
15 at trial or by deposition at any time in your
16 career, correct?

17 A. Correct.

18 Q. Okay. And let's go to appendix A,
19 which is your CV. Did you write this yourself?

20 A. I think this was written by the clerks
21 in my chambers. They probably showed bits to
22 me, but I wasn't the primary author of this. By
23 "this" we're talking about the CV at the end.

24 Q. Yes, we are. Appendix A.

25 A. Yes.

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2 the principle applying as against the party
3 invoking or benefiting from a particular
4 clause." Do you see that?

5 A. I do.

6 Q. Do you have a view on that subject as
7 to whether it applies to the draftsman?

8 A. As I say there, there are differing
9 views. The view I have on contra preferentem is
10 that it's a largely relevant doctrine, certainly
11 in commercial contracts between two
12 sophisticated commercial parties.

13 So, to the extent I have a view as to
14 when it applies as between those people, I don't
15 have a strong view. I'm very happy to go with
16 what Sir Kim says about there being two views.

17 Q. Let's just talk about what triggers
18 the contra proferentem rule.

19 A. Uh-huh.

20 Q. Do you have a view as to whether or
21 not -- so you don't have a view as to whether it
22 applies with respect to who is the draftsman;
23 is that correct?

24 A. I don't have a strong view. To me the
25 key question is whether it applies at all rather

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2 than whether it applies to this person or that
3 person.

4 Q. All right. And do you agree, as you
5 say here, that it applies against the party
6 either invoking or benefiting from the
7 particular clause?

8 A. Well, that is one of the two views,
9 and I can see that the contra proferentem
10 doctrine, if it ever applies, may be invoked
11 against the person who seeks to benefit.

12 Q. Would you agree that whether it's the
13 draftsperson or the party invoking it or the
14 party benefiting from it in this case, it's
15 Canary Wharf in all three?

16 A. Yes, I would agree.

17 Q. And your view is that the contra
18 proferentem rule is largely irrelevant, as I
19 understand your testimony; is that correct?

20 A. That is correct in the context of the
21 case involving Canary Wharf on one side and
22 Lehman on the other side, both very
23 sophisticated parties, who neither of whom need
24 the protection in the way that a consumer might
25 need from rules like the contra proferentem

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2 rule.

3 Q. All right. Do you have any -- do you
4 cite any case law for the notion that the contra
5 proferentem rule does not apply as between two
6 commercially sophisticated parties?

7 A. Well, if you look further down
8 paragraph 33, you will see a reference to Mrs.
9 Justice Gloster, now Lady Justice Gloster, "the
10 principle is 'of uncertain application and
11 little utility in the context of commercially
12 negotiated agreements.'"

13 That reflects a long-standing
14 understanding to the effect that, where you're
15 doling with sophisticated parties who can take
16 care of themselves and object to what is being
17 preferred to them, as Lehman would plainly have
18 been able to do, the contra proferentem rule
19 really doesn't help.

20 Q. Well, would you agree that where a
21 court who is looking at a contract is unable to
22 determine because there are things that point
23 both ways as to its meaning, that it is a rule
24 at least of last resort?

25 A. It certainly can be a rule of last

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2 indicia that something is a contract of
3 guarantee, yes.

4 Q. And if you go to the next page, that
5 page 312 -- I guess part of what I read was on
6 312 -- a few lines down, it says, "The surety's
7 liability in such a case is conditional upon the
8 principal's failure to pay the particular debt."

9 Would you agree that that is also an
10 indicia of something being a guarantee where it
11 is contingent upon the principal's failure to
12 perform?

13 A. I would. I think what Sir William
14 Blackburne is describing is the fact that a
15 guarantee is, in general, regarded as a
16 secondary obligation, that is to say the primary
17 debtor has the primary obligation and the
18 guarantor has a secondary obligation, and he
19 says that in order to distinguish it from the
20 contract of indemnity where the surety has a
21 primary obligation or undertakes the primary
22 obligation.

23 Q. Right, and that's the point that is
24 made in the next paragraph where it says, "An
25 essential distinguishing feature of the true